UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JEFFREY HART :

Plaintiff 72-CV-1041

-against- : U.S. District Court
Brooklyn, New York

COMMUNITY SCHOOL DISTRICT 21

Defendant :

February 22, 2008
- - - - - - - - - - - - - - - - - X 11:30 a.m.
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ANJAN RAU, et ano

Plaintiffs 08-CV-210

-against- :

NEW YORK CITY DEPARTMENT
OF EDUCATION

Defendant :

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BEFORE:

HONORABLE JACK B. WEINSTEIN
United States District Judge

APPEARANCES:

For the Plaintiff: JAMES I. MEYERSON
64 Fulton Street
SUITE 502
New York, New York 10038

For the Defendant: Community School District and NYC Board of Ed.	GAIL RUBIN Chief, Affirmative Litigation Division New York City Law Department 100 Church Street New York, New York 10007
For NYS Third Party:	WILLIAM H. BRISTOW III Assistant Attorney General 120 Broadway New York, New York 10271-0332
For Plaintiff Interveners	JONES DAY 51 Lousiana Avenue, N.W. Washington, DC 20001 BY: SHAY DVORETZKY
Parent Speakers:	PAMELA KELTER MARIANNE RUSSO MR. RONALD STEWART
Court Reporter:	RONALD E. TOLKIN, RMR Official Court Reporter 225 Cadman Plaza East Brooklyn, New York 11201 718-613-2647

Proceedings recorded by mechanical stenography, transcript produced by Computer-Assisted Transcript.

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THE COURT: Good morning, everybody.

I don't know if you can hear me back there. If you'd like, you can sit in the jury box or sit up in the front if you have any trouble hearing.

THE CLERK: Civil cause for motion, Jeffrey Hart and Anjan Rau versus New York City Department of Education, et al.

Counsel, please note your appearances.

For plaintiff and Hart.

MR. MEYERSON: Your Honor, James Meyerson for the plaintiff.

THE COURT: Good to see you again.

MR. MEYERSON: Good to see you, Your Honor. It has been a long journey.

THE CLERK: Community School 21?

MS. RUBIN: Gail Rubin from New York City Law Department.

THE CLERK: For Rau?

MR. DVORETZKY: Shay Dvoretzky from Jones Day.

MR. BRISTOW: Your Honor, William Bristow for the state defendants in the Hart matter.

THE COURT: Who do you represent?

MR. BRISTOW: Your Honor, we were faxed a copy yesterday of the February 14th order at the AG's office.

THE COURT: So you represent the state?

MR. BRISTOW: Yes. I believe there are two state

third-party defendants.

THE COURT: All right. We're pleased to have you. As the United States was also invited through the United States attorneys but declined. I'm happy to hear you.

MR. DVORETZKY: Good morning, Your Honor.

We filed our motion to intervene in this case, and we believe that the requirements of Rule 24 for intervention are satisfied. Nobody has opposed that motion or indicated that the Rule 24 requirements are not met. Regardless of the outcome of the City's motion before the Court today, to terminate or modify this Court's 1974 order, there are additional claims that remain to be litigated, particularly focusing on retrospectively for Nakita Rau.

THE COURT: You have a separate case.

MR. DVORETZKY: We have filed a separate case as well as a motion to intervene here.

THE COURT: Well, those issues will be handled in that separate case.

MR. DVORETZKY: They can be handled in either forum, and in filing both the motion to intervene and the separate case, we were, in effect, using belts and suspenders. That said, I think, first of all, that the requirements of Rule 24 are satisfied here and that Ms. Rau's claim, Nakita's claim, may turn, in some large measure, on the Court's interpretation of its prior 1974 orders. And for that reason, it would be

appropriate to litigate that claim here.

In addition, no matter what the outcome of the case here today, no one can be sure that the Hart litigation will, in fact, be over even if you grant the relief that the City is seeking, because we can't preclude the possibility of a motion for reconsideration by someone or a notice of appeal. If something like that were to happen, we'd like to be parties to represent our interests.

THE COURT: Thank you.

MS. RUBIN: Your Honor, we have no objection to the motion to intervene. Shall I address the motion to terminate.

THE COURT: Please.

MS. RUBIN: We are here On behalf of the Chancellor and the Department of Education in a motion to end the remedial order governing. United States Supreme Court precedent mandates that if we can show that we have reasonably complied over a reasonable period of time and that there are no vestiges of segregation remaining, that the order should be lifted.

We think we have put in factual and material to demonstrate this, and I don't believe that there's any factual dispute about what has been going on for the last 30 plus years in District 21 and Mark Twain.

Your order in 1974 led to the establishment of a wonderful school, a racially mixed school, an excellent

school. Highly competitive school. It was a success beyond our wildest expectations at the time. It has continued that way for many years, in compliance with the order. We've put in data which demonstrates that we have done admissions in accordance with the requirements of the order, and it's our belief that there are no vestiges remaining from the original finding of segregation, which, as you recall, was tied to the feeder patterns at Mark Twain.

In accordance with the order, the district changed the feeder patterns at the time, and if you look at the schools in the district, they are basically racially mixed. And Mark Twain, again, is a wonderful, successful, integrated place for many years. So we're here, at this point, to say that we think we've complied. We think that the tests have been met and we're asking you to terminate the remedial order.

THE COURT: Thank you.

MR. MEYERSON: Your Honor, we take a very limited position. We do agree that the desegregation of Mark Twain, as we frame the desegregation of the Mark Twain school has been fully achieved. We believe, based upon your finding in 1990, the Court felt at that time it was fully achieved. That the defendants in the initiating litigation have fully complied with the desegregation order of 1974. And again, we believe your 1990 order, in effect and substance, stated that. We think what you should do at this point in time is simply

dismiss the case making the requisite findings of full compliance and effective desegregation. The Court should be very narrow in the scope of its order.

With respect to the intervention, we've taken no position. Although reflecting on it, in light of what counsel has stated, it does raise the issue of whether or not a formal dismissal at this time is not, in effect, retroactive to 1990 when you made the fundamental findings that full compliance had been achieved at that time. And that your reflection that the continuing jurisdiction of the Court, yourself had reflection that the continuing jurisdiction of the Court was no longer necessary. Having said that and understanding that you've never formalized that, we believe that you should formalize that as I have previously discussed.

THE COURT: Thank you.

Does the state wish to add anything?

MR. BRISTOW: No, Your Honor.

THE COURT: The motion to intervene is going to be denied for two reasons. First, implicit is the contention that the law has changed making the 1974 remedial order invalid as applied to the proposed intervenors' children is unfounded. If the facts were the same today as they were in 1974, the same decree would issue because the plaintiffs proved both de facto and de jure segregation. Brown v. Board of Education of Topeka still rules. Segregation of this kind

that we had in Mark Twain was illegal and would still be illegal. Moreover, the Supreme Court has not declared, in any of its cases since Brown, that racial and other socio economic factors cannot be taken into account in administering local schools. The Supreme Court's ruling in the Seattle school case and the Kentucky case of last year, which are relied upon, in effect, by the proposed intervenor has not changed the legal landscape as it applies to the situation now.

Majority opinion offered by the chief justice in Seattle is summarized as follows:

"The school districts," that is the Seattle and Kentucky school districts," have not carried their heavy burden of showing that the interest they seek to achieve justifies the extreme means they have chosen, discriminating among individual students based on race by relying upon racial classifications in making school assignments."

And he went on:

"Although remediating the facts of past intentional discrimination is a compelling interest under the strict scrutiny test" that interest is not involved here that is in Seattle, because the school cases there were never segregated by law nor subject to a court ordered desegregation order.

That is not the case in the Mark Twain litigation where there was segregation and both de jure and de facto, and

there was an order, which was affirmed on appeal.

He went on to say, the chief justice:

"Moreover, these cases are not governed by Grutter v Bolinger" -- those were the Michigan college cases in which the court held for strict scrutiny purposes, a government's interest in student body diversity "in the context of higher education" is compelling."

The Grutter court noted that it is:

"Not in interest in simple ethnic diversity" in which a specified percentage of the student body is, in effect, guaranteed to be members of selected ethnic groups that can justify the use of race, but a far broader array of qualifications and characteristics of which racial or ethnic origin is a single though important element."

Now, in Brown, the chief justice directly addressed the problem of the difference between the considerations in graduate school and in grade school. It is a particular anomaly, I believe, for the chief justice to make this distinction, because the whole theory and history of the NAACP and NAACP Legal Defense Fund was to start with the appellate -- excuse me, to start with the graduate and undergraduate colleges where they saw that segregation would make it impossible for people who are segregated to be successful in their careers; and then having established that position, move down to grade school.

What Chief Justice Warren said, in Brown, was:

"In finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied, in large part, on those qualities which are incapable of objective measurement but which make for greatness in a law school. The Court, in requiring in McLauren that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations. His ability to study, to engage in discussions, and exchange views with other students, and in general, to learn his profession, are important."

Then the Chief Justice Warren went on to say this:

"Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications, solely because of their race, generates a feeling of inferiority as to their status in the community that may effect their hearts and minds in a way unlikely ever to be undone.

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has a sanction of the law. The policy of separating the races is usually interpreted as denoting the inferiority of the Negro group," and then he went onto explain why this retarded education of

an important segment of the community in Brown.

Now, there were three justices in the Seattle case who agreed with the chief justice. There were three who agreed with Justice Breyer, who said a variety of things but this is a quotation that seems, to me, to sum it up:

"These cases consider the longstanding effort of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted within the last 50 years by primary and secondary schools throughout the nation. All of these plans represent local efforts to bring about the kind of racially integrated education that Brown v Board of Education long promised efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interest at stake in such cases are compelling. We have approved narrowly tailored plans that are no less race conscience than the plans before us, and we have understood that the constitution permits local communities to adopt desegregation plans even where it does not require them to do so." Now, that takes care of eight justices on two sides of the issue.

The ninth justice was Justice Kennedy, and he wrote the critical decision in this case -- or these cases. They were combined. The principal set forth by the supreme court in Marks v United States is:

"When a fragmented court decides a case and no single rationale explains the result and enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." That's from the Grutter case.

Now, in the Grutter case that meant that the view of Justice Powell, who concurred in the Bakke case, you remember that was the California case:

"That student body diversity is a compelling state interest that can justify the use of race in university admissions."

I remind you again that the chief justice pointed out that that problem is at least as great and is as important at grade schools.

That, therefore, brings us to the Kennedy opinion in the Seattle cases which constitutes, therefore, the ruling opinion for the purposes of application. Justice Kennedy wrote:

"This nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that insures equal opportunity for all its children. A compelling interest exists in avoiding racial isolation, an interest that a school district in its discretion and expertise may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student

population." Which is just what was done in Mark Twain, not only by dealing with the racial discrimination but by providing all these special programs for all kinds of talented children in arts and computers, in the various forms of athletics and so on, which I will refer to in a moment.

"Race may be one component," he went on, "of that diversity, but other demographic factors plus special talents," he said, "and these should also be considered. The government is not permitted to do, absent a showing of necessity," not made here, that is in the Seattle case, "is to classify every student on the basis of race and to assign each of them to schools based on that classification." Which was not what was done in Mark Twain.

"The decision today," Justice Kennedy said, "should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Those entrusted with directing our public schools can bring to bare the creativity of experts, parents, administrators, and other concerned citizens, to find a way to achieve the compelling interest they face without resorting to widespread government allocation of benefits and burdens on the basis of racial classifications alone."

Now, the second reason the motion to intervene must be denied is because this case is closed. The docket sheet

indicates that it's closed, the Court of Appeals repeatedly stated that it's closed and it is closed. However, the supreme court has stated that defendants are entitled to a certificate of closure, and it will be issued forthwith.

The defendants have complied with the 1974 remedial order. Mark Twain has been desegregated. The Court has no further jurisdiction over the case and, therefore, intervention in a case which is not alive makes no sense whatsoever. If the plaintiffs wish to intervene, wish to bring any unconstitutional issue to the Court's attention, it will be in the parallel case that's brought. And in due course, the city and any other authorities will make the necessary motions and conduct the necessary discovery.

I should point out, since there are a number of people from the community here, that the Court has received many letters from parents whose children currently attend Mark Twain or have attended in the past. Students from this wonderful school created by so many devoted teachers, students, parents, government officials from local, state, and federal levels have contributed to making this a better borough, city, state, and country. And in their letters, these parents raise the concern that there should not be any radical changes that would tend to destroy this stellar model of urban education.

Now, it's the Court's understanding, from the city's

submission, that it is not the intention of the city to destroy this school. On the contrary, the city wants to continue to improve it. Based on the arguments today and in the briefs, the Court is convinced that the City and the Department of Education are acting in good faith, and that they intend to continue the school along these present excellent lines.

However, to assure the many people who continue to write to the Court, the Court requests a letter from the Chancellor or the mayor indicating that:

1. The September 2008 admission policy will not appreciably change with respect to selection criteria, with respect to talents and the like;

2. Students currently attending satisfactorily will be permitted to graduate on schedule;

3. Mark Twain will continue to be conducted as a superior magnet school as in the past and;

4. Mark Twain will be conducted as it has been for many years now, as an integrated and desegregated school.

That should be no problem.

The Court, that is I, I'm the Court, visited the school yesterday. I had the marshal drive me over with my clerks, and it was closed due to the school holiday, which was all right because I didn't want to go inside and annoy everybody. The Court would like to bring to the chancellor's

attention, if you will, that the lovely metal gates at the school entrance on Neptune Avenue are rusting. Try to see that they're painted promptly. That may improve morale. The sign indicating that it is a magnet school also needs touching up. See that that is done, please.

The Court would like to thank the concerned parents for writing and voicing their concerns, and for the parties for submitting briefs. It wishes, again, to note the contribution made to the desegregation of this school and to its improvement by the attorneys in this case, James Meyerson, who was a very, very young man when he started for the plaintiffs. Elliot Hoffman for the Chancellor in '74, Gail Rubin for the Chancellor now.

Hyman Bravin, is he still alive?

MR. MEYERSON: No, he is dead.

THE COURT: I thought he passed away. He did a wonderful job for the defendants, third-party defendants. And United States attorney Edward Boyd and Robert Hammer represented the state at that time. James Hollingsworth for the City Housing Authority. And then we had two wonderful expert you remember, Dan Dodson for the plaintiffs. And who was the expert -- Glaser, Mason Glaser for the defendants. He was very good. The principal was wonderful and so was the staff and the teachers and the parents and others.

The Court would, at this time, also like to mention

Curtis J. Berger, the Special Master in this case. He made a wonderful contribution. His unfortunate death has deprived us of innovative and workable methods of ending segregation in urban environments. There was a memorial written to him published in '99 Colombia Law Review called "Scholar and Teacher: People, Person and Institution Conciliator." It contains a picture of him. You will remember it and him.

MR. MEYERSON: I certainly do.

THE COURT: Unfortunately, he is dead.

So is there anything further?

MS. RUBIN: No, Your Honor.

THE COURT: We have copies of the draft of my opinion for anybody who wishes it, and we have copies of this article memorializing this great man. If there is nothing further, this hearing is adjourned.

A PARENT: Your Honor?

THE COURT: I'm sorry. If you'd like to be heard, please come forward. You can sit down right here. Give your name.

MS. KELTER: My name is Pamela Kelter, K-E-L-T-E-R. My child is a student at Mark Twain. I had to write this.

THE COURT: Okay.

MS. KELTER: Every parent wants the best for their child. Every parent wants an opportunity for their child to grow, flourish, and blossom. Some of us have every resource

to give our children those opportunities, not wasting a single moment, not leaving anything up to chance. Other parents must rely on society and its effort to create school environments that provide better educational opportunities for all children. Most children only have the second choice. Public school is a gateway for many children to become something beyond their wildest dreams. An opportunity for their lifetime.

Turning over the court order at Mark Twain could have a severe impact on the school, jeopardizing the education of 1,300 students each year. The court order designates that Mark Twain is a state magnet school. The state gives Mark Twain approximately $300,000 annually for this magnet status. Taking away the court order risks this status.

Additionally, just a few weeks ago, Mark Twain was notified by the Department of Education that this year's school budget will be cut by $120,000 and that number will double next year.

The court order also designates free busing for students living within District 21, this too would be jeopardized. How many parents will permit their children to travel to Coney Island by mass transit?

Mark Twain is not located on the edge of several neighborhoods, it is not located in a strategic site, making it susceptible to minority group isolation.

Mark Twain's unique talent testing is included in the court order. As this labor intensive process does not streamline well with the rest of the city's standardized testing, it too is at jeopardy. Mark Twain's funding, transportation, and selective testing process are all wrapped up in this court.

What is not seen or mentioned here in the newspapers is the blood and sweat that has poured into Mark Twain since the 1970's to make it a rock solid institution. The enthusiastic, hope, and unity that must have been planted then is still with the school now. Mrs. Moore and all her staff dedicate themselves to improving and enriching all students in the school. Students who have such diverse backgrounds and diverse resources. Students who have emotional, environmental, and family challenges are scaffolded into adulthood with care and love and understanding.

Families who are financially challenged are given an opportunity and a guiding hand by the schools, an opportunity that would not be possible without the teamwork of dedicated teachers and counselors at Mark Twain. I don't think the color of these students is noted, but many students of color are helped.

Chancellor Klein has never visited the school. He has never seen the joy and excitement, the unabashedly enthusiastic teamwork.

District 20 and 21 have other gifted and talented schools, many of them are dominated by Asian and/or white students. Mark Twain has a diversified population, much like the city we live in.

In the recent 2007 supreme court case, Justice Kennedy states in his opinion, "In the administration of public schools by the state and the local authorities it is permissible to consider the racial make up of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."

Ultimately, all children who attend Mark Twain, win. They are better prepared to know, to understand, and to work with people of all races and backgrounds.

THE COURT: Thank you for your very eloquent statement. Would you please bring that, and these other letters, to the attention of the Chancellor.

You might want to visit the school. It is a beautiful spot, and it has a tennis court.

MS. KELTER: Those aren't our tennis courts. Mrs. Moore won't allow the children to go out there.

THE COURT: She doesn't allow them to use the tennis courts?

MS. KELTER: What happened, several years ago --

THE COURT: I thought they were part of the school.

MS. KELTER: They're part of the park. Several

years ago they did a Walk-A-Thon and one of the children was mugged in the middle of the Walk-A-Thon. So for safety, we don't use the facility.

THE COURT: I'm sorry to hear it.

MS. KELTER: The neighborhood is not where it should be.

THE COURT: It has improved a lot from what it was when I first started. Bring that to the Chancellor's attention and maybe they can do something with the park Department.

Would you like to be heard too? Give your name please.

MS. RUSSO: Marianne Russo. We would just like to note that the city education department has changed from the Board of Education to DOE, and therefore, the admission process or the selection process at Mark Twain has also been changed with incoming from District 20 and Region 7 and now the OC both. We believe, as parents, that the DOE, at the present time, has mismanaged the selection process.

THE COURT: Who has?

MS. RUSSO: That they are no longer following the court order regarding priorities to Coney Island residents and District 21. Also, in their documents they're stating that it is now a city-wide school. One data that was presented by PTA before DOE made these changes to admissions, out of 170

children from the Coney Island area that applied, 40 were accepted. This year, though, in 2007, September of 2007, out of, again, almost the same, 100 something children, only 14 were admitted. So therefore, we're asking the Court to assign an independent panel to review that DOE at this time to see if it's following the court order, because we believe they are not.

THE COURT: I'm not in a position to do that.

Will you bring it to the attention of the Chancellor?

MS. RUBIN: Yes.

THE COURT: The original intention was to desegregate 21 and then it was expanded to the city as a whole, partly to help the students in District 21. I know that there was another intermediate magnet school established in the district, but I'm not in a position to get involved in that kind of detail. I'm sorry.

MS. RUSSO: Thank you.

THE COURT: Is your child a student there now?

MS. RUSSO: Yes.

THE COURT: Well, I think that your child will be protected.

MS. RUSSO: We're also concerned with other children in District 21 no longer are protected.

THE COURT: Of course you want a good balanced

school.

MS. RUSSO: It is now the intention of the Chancellor to make it a city-wide school.

THE COURT: Okay. Bring that to the attention of the Chancellor.

MS. RUBIN: Okay.

THE COURT: Sir, come forward and give your name.

MR. STEWART: My name is Ronald Stewart, S-T-E-W-A-R-T. I am currently a resident of Coney Island, Judge Weinstein. I testified when we were both young men, some years ago.

THE COURT: You still look pretty good.

MR. STEWART: You too, Judge. I was 17 years old. I testified in this court situation. I'm still a resident of Coney Island. I went to Mark Twain prior to it becoming a gifted and talented school. In fact, you asked me what did I think before -- Referee Curtis Borg, who I escorted throughout the community, took him to the homes of the African-American parents who expressed their concern, and you asked me what did I think. At the time I felt that the school should have remained as it was. I said we should bring in quality teachers, bring in materials that we felt was needed at the time.

I knew Doris Hart. I remember Mr. Meyers who represented the NAACP. And I didn't know that Mr. Berger had

since deceased; a great, great mind, great thinker. I knew Jeffrey Hart, who was the complainant. I'm happy to hear what your decision is. As Mrs. Russo said, this is a community school. District 21 has benefited for many years. Two of my daughters attended Mark Twain as a gifted -- one is now -- she is now making more money than me. She went to Howard University. I had another daughter went to Morgan State. Both live in the District of Columbia.

I think all parents in this district, the number one concern is education that their child receives is a quality education. Over the years I wasn't too pleased with the amount of children that were going into District 21. As Mrs. Russo said, the schools in the area, 188 and 288 and PS-90, one or two of the students, particularly black and Hispanic, entered the school.

But I am a member of the community education council, the president, and we're diligently working with the district to make sure that your decision is met. That there is diversity and fairness, and Mark Twain has given a lot of its students, in this area, a quality education and an opportunity to display their gifts and talents and move onto greater heights. We need the school to remain as it is. Of course, we need to monitor and make sure that there is fairness.

So I'm happy that the decision for you to have it

remain as it is and, hopefully, that Mark Twain can continue to do the quality work that it is doing. And we feel that District 21 should have preference to children there, because they see it as a community school. A lot of the black parents felt, during that period, that we lost the school. But over the years we've worked with the district at the time, whoever was in the school board, to make sure that your decision was met. That's basically what I needed to say.

THE COURT: Thank you.

If you would bring that to the attention of the Chancellor. Please, do.

MS. RUBIN: Yes, Your Honor.

THE COURT: Anybody else wish to be heard?

All right. This hearing is completed, and thank you all very much.

MS. RUBIN: Thank you, Your Honor.

MS. RUBIN: Do you want to have a status conference?

THE COURT: On the other case? No. Why?

MS. RUBIN: In your order that a status conference would follow.

THE COURT: We had it. The status is that you will proceed with that case, promptly, I assume. You will make a summary judgment and discovery motions. Who is the magistrate judge assigned?

MS. RUBIN: Magistrate Matsumoto.

THE COURT: Well, she'll take care of whatever problems you have. Thanks very much. Nice to see you all. Good-by.

MR. BRISTOW: Thank you, Your Honor.

MS. RUBIN: Thank you, Your Honor.

(Proceeding Concluded.)

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